

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1183

13
PJS
To be argued by
Michael Hartmere

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 77-1183

UNITED STATES OF AMERICA,

Appellee,

—v.—

MARGARET LEE ROBINSON and PATRICIA SAVERESE,

Appellants.

On Appeal From The United States District Court
For The District of Connecticut

BRIEF FOR APPELLEE

PETER C. DORSEY
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT
270 ORANGE STREET
P.O. BOX 1824
NEW HAVEN CT 06508
(FTS) 8-643-8108

MICHAEL HARTMERE
ASSISTANT UNITED STATES ATTORNEY

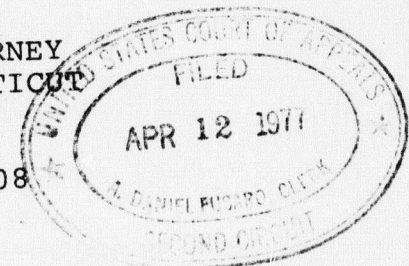


TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Statement of the Case	1
Statutes Involved	5
Questions Presented	6
ARGUMENT:	
I. Defendants' Double Jeopardy Claim Has Previously Been Rejected By This Court	7
II. By Refusing To Proceed With The Reconstituted Jury, The Defendants Impliedly Consented To The Declaration Of A Mistrial	9
III. There Was A Manifest Necessity For The Declaration Of A Mistrial.	11
CONCLUSION.	14

TABLE OF AUTHORITIES

	PAGE
<u>Illinois v. Somerville</u> , 410 U.S. 458 (1973).	13
<u>Jhirad v. Ferrandina</u> , 536 F.2d 478 (2d Cir. 1976).	9
<u>Wade v. Hunter</u> , 336 U.S. 684 (1949).	12, 13
<u>United States v. Fernandez</u> , 506 F.2d 1200 (2d Cir. 1974)	8
<u>United States v. Gentile</u> , 525 F.2d 252 (2d Cir. 1975), cert. denied, 425 U.S. 903 (1976)	11
<u>United States v. Goldstein</u> , 479 F.2d 1061 (2d Cir.), cert. denied, 414 U.S. 873 (1973)	11
<u>United States v. Grasso</u> , ____ F.2d ____ (2d Cir. Slip Op. 2255, March 9, 1977)	14
<u>United States v. Jorn</u> , 400 U.S. 470 (1971)	12
<u>United States v. Newman</u> , ____ F.2d ____ (2d Cir. Slip Op. 1559, January 25, 1977).	7, 9 14
<u>United States v. Perez</u> , 9 Wheat. 579 (1824).	13
<u>United States v. Robinson</u> , 421 F. Supp. 467, D. Conn. 1976.	3
<u>United States v. Tateo</u> , 377 U.S. 463 (1964).	11

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 77-1183

UNITED STATES OF AMERICA,

Appellee,

—v.—

MARGARET LEE ROBINSON and PATRICIA SAVERESE,

Appellants.

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

On April 21, 1976, a Federal Grand Jury sitting at New Haven, Connecticut, returned a true bill of indictment (N-76-63) charging the defendants with violations of Title 18, United States Code, Sections 656 and 371 in two counts. Count One charged the defendant Robinson with embezzlement of approximately \$1,779.00 from a Federally insured bank in violation of Title 18, United States Code, Section 656. Count Two charged co-defendants Robinson, Saverese, and one Jethro Brown with conspiracy to commit that offense in violation of Title 18, United States Code, Section 371. Prior to this matter being

reached for trial, co-defendant Brown pled guilty to Count Two.

On June 21, 1976, this case appeared on the jury assignment list before the Honorable Jon O. Newman. Prior to jury selection, it was agreed that trial would be set for August 30, 1976, due to the vacation schedule of defense counsel. A jury of twelve with five alternates was selected, but not sworn, the Government having been allowed seven peremptory challenges and defense counsel thirteen peremptory challenges. (App. 2).^{*} The defendants Robinson and Saverese then moved to expunge four of the Government's peremptory challenges on the grounds of a systematic exclusion of blacks from juries in the District of Connecticut through the Government's use of peremptory challenges. The Court then deferred ruling on the defendants' motion until briefs could be submitted on the issue.

On June 29, 1976, the defendant Saverese filed her brief in support of her motion to strike the Government's jury challenges. On July 21, 1976, the Government filed its response in opposition to defendant's motion to strike jury challenges.

Thereafter, on August 31, 1976, the defendant Robinson filed her memorandum in support of her motion to strike the

^{*}References marked "(App.)" refer to the joint appendix to briefs for Appellants Robinson and Saverese.

peremptory challenges of the Government and an affidavit of Mario G. Conte, Jr. On October 5, 1976, the Government filed its supplemental response in opposition to defendants' motions. On October 15, 1976, Judge Newman filed a memorandum of decision and order disallowing the Government's peremptory challenges, reinstating four of the Government's peremptory challenges to the panel, and requiring the Government to keep statistical reports. (See United States v. Robinson, 421 F. Supp. 467, D. Conn. 1976). On October 18, 1976, the Government filed a motion to reconsider and on October 26, 1976 the Court allowed the Government one week to submit further material. On November 4, 1976, the trial court denied the Government's motion to reconsider and set jury selection for November 29, 1976.

On November 29, 1976, the Government moved for a continuance of jury trial and jury selection on the grounds that a petition for writ of mandamus and motion for stay had been mailed to the United States Court of Appeals for the Second Circuit. After hearing arguments from both sides, the trial court denied the Government's motion for a continuance and proceeded to select and swear a jury of twelve with two alternates. (App. 62-99).

During the afternoon of November 29, 1976, the United States Court of Appeals for the Second Circuit stayed further proceedings in this matter and on January 25, 1977 issued a

writ of mandamus in effect reversing Judge Newman's decision of October 15, 1976. (App. 12-35).

On March 7, 1977, pursuant to the mandate of this Court, this case again appeared on a jury assignment list before Judge Newman. At that time, the Government again announced that it was ready for trial. Thereafter, the Court and counsel for both defendants discussed the alternatives available to the defendants under the decision of the Court of Appeals. Both counsel acknowledged that they understood the choices as outlined by the trial court and both counsel rejected the first choice of a reconstituted jury. (App. 109-111). The defendants having rejected the first alternative suggested by the Court of Appeals, the trial court then declared a mistrial. (App. 115-116).

Subsequent to the trial court's declaration of a mistrial on March 7, 1977, both defendants moved for a continuance for one week in order to file a motion to dismiss based on grounds of double jeopardy. (App. 117).

On March 28, 1977, Judge Newman denied the defendants' motion to dismiss based on grounds of double jeopardy in a written opinion. (App. 38-47).

Judge Newman's decision denying the defendants' motion to dismiss based on grounds of double jeopardy is the subject matter of this appeal.

STATUTES INVOLVED

Title 18, United States Code

Section 656.

"Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than \$5,000 or imprisoned not more than five years, or both;"

Section 371.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

United States Constitution, Amendment V

". . .[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ."

QUESTIONS PRESENTED

1. Has the defendants' double jeopardy claim previously been rejected by this Court?
2. Did the defendants impliedly consent to the declaration of a mistrial by refusing to proceed with the reconstituted jury?
3. Was there a manifest necessity for the declaration of a mistrial?

A R G U M E N T

I. DEFENDANTS' DOUBLE JEOPARDY CLAIM HAS PREVIOUSLY BEEN REJECTED BY THIS COURT.

In opposing the Government's petition for a writ of mandamus in United States v. Newman, ___ F.2d ___ (2d Cir. Slip Op. 1559, January 25, 1977), the defendants argued that an issuance of a writ of mandamus in this case would necessarily violate the double jeopardy clause. (Brief for Appellant Margaret Robinson, p. 7). That the Newman panel considered the double jeopardy issue is evidenced by the fact that questions concerning double jeopardy were posed by the panel at oral argument.

Moreover, the opinion in United States v. Newman, supra, specifically refers to November 29, 1976 proceedings before Judge Newman, at which time the Government moved for continuance of jury selection because of a potential jeopardy problem. (App. 35). On November 29, 1976, Judge Newman obviously believed that if this Court, in the mandamus action, allowed the Government peremptory challenges to stand, the three individuals previously challenged by the Government could be removed and replaced by other members of the panel. (App. 72).

Finally, the Newman panel ended its opinion by stating:

"If the defendants do not elect to proceed as first suggested above, (replacement of those on the jury previously the subject of Government peremptory challenges), the district judge will declare a mistrial and order that the case be reassigned for trial with reasonable promptness." (App. 35).

It is inconceivable that the Newman panel would have employed such language in its opinion had it not fully considered and rejected the defendants' double jeopardy claim. Judge Newman, in denying the defendants' motion to dismiss on grounds of double jeopardy stated:

"If not technically the law of this case, the Court of Appeals decision is surely a commanding precedent, and a district judge to whom a writ of mandamus has been issued is understandably reluctant to think that a Court of Appeals has instructed him to act in violation of the Constitution."
(App. 43).

In the present appeal, this Court has the power to reopen the double jeopardy issue previously decided against the defendants by the Newman panel. United States v. Fernandez, 506 F.2d 1200, 1203 (2d Cir. 1974). The Government suggests, however, that the circumstances of this case do not warrant a departure from the Newman panel's decision. Unlike the situation in Fernandez, there is no new evidence before this Court which was not presented in the mandamus action. Defendant Robinson's suggestion (Robinson brief, p. 8) that the Newman Court directed Judge Newman to act in violation of the Constitution since the defendants might plead guilty or nolo contendere is simply incredible.

While the law of the case doctrine is discretionary in this Circuit, the Government contends that the defendants are merely restating an argument squarely presented to and rejected

by the Newman panel. Jhirad v. Ferrandina, 536 F.2d 478, 483 (2d Cir. 1976). Since no new evidence has been presented in this appeal, defendants' double jeopardy claim should again be rejected by this Court.

II. BY REFUSING TO PROCEED WITH THE RECONSTITUTED JURY, THE DEFENDANTS IMPLIEDLY CONSENTED TO THE DECLARATION OF A MISTRIAL.

The decision of this Court granting the Government's petition for mandamus in this case, United States v. Newman, ___ F.2d ___ (2d Cir. Slip Op. 1559, January 25, 1977), concluded as follows:

"The petition for mandamus is granted and the writ may issue accordingly.

"On remand the district court will afford the defendants the opportunity, in accordance with the suggestion by Judge Newman in open court on November 29, 1976, to proceed with the present jury after the three members, previously ordered onto the final panel by the district court, have been removed, and that the places of the discharged members of the jury panel be filled by the two remaining alternates, and the the two unassigned veniremen from the jury pool take the places of the two alternates who have become members of the jury panel.

"In the event that the two defendants fail to agree on the above procedure, the cases will have to be severed. If the defendants do not elect to proceed as first suggested above, the district judge will declare a mistrial and order that the case be reassigned for trial with reasonable promptness.

"It is so ordered." (App. 35).

Accordingly, when this case appeared on the jury assign-

ment list before Judge Newman on March 7, 1977, the Court took great care to ensure that both defendants and their counsel understood the available alternatives. (App. 101-102). Both counsel indicated that they had discussed the matter with their clients and that they understood the available alternatives. (App. 102).

When asked how he wished to proceed, Attorney Bowman stated:

"On behalf of the defendant Margaret Robinson, as the Court is well aware, on November 29, a jury was selected, impaneled and sworn, which contain two blacks and ten whites.

"It is my client's position she had a right to be tried by that jury. We object to the discharging of that jury as selected on that day, and we object to the impaneling of a new jury, and that's our position.

"We do not regard a mistrial as a choice because I don't believe the Court of Appeals in its opinion has given us that choice, but has rather stated that if we do not elect, as they first suggest, that this Court shall declare a mistrial, therefore, we do not choose and we do not move the Court for a mistrial, but rather we object to the discharging of that jury as it was selected on November 29, impaneled and sworn." (App. 102-103).

After addressing itself to a variation of the procedure mandated by this Court, the trial court again specifically asked both counsel whether they wished to elect the first choice. Before doing so, however, the trial court made it abundantly clear to counsel that the inevitable result of a

rejection of the first choice would be the declaration of a mistrial. (App. 108-109). Thereafter, both counsel rejected the first choice, namely, proceeding before a reconstituted jury. (App. 110-111).

Judge Newman, in rejecting the defendants' double jeopardy claim, clearly considered the above conduct to constitute an implied consent to the declaration of a mistrial. Judge Newman properly interpreted the defendants' rejection of the first alternative and concluded:

"There is no requirement that consent, to be valid, be accompanied by happiness. When the defendants rejected the first choice, knowing that the only alternative was a mistrial, they gave their consent to a mistrial in an entirely realistic sense." (App. 44).

The Government strongly suggests that there is only one reasonable interpretation to be given to the defendants' rejection of proceeding with the reconstituted jury - implied consent to a mistrial. See United States v. Tateo, 377 U.S. 463, 467 (1964); United States v. Gentile, 525 F.2d 252, 252-258, (2d Cir. 1975), cert. denied, 425 U.S. 903 (1976); United States v. Goldstein, 479 F.2d 1061, 1065-1068 (2d Cir.), cert. denied, 414 U.S. 873 (1973).

III. THERE WAS A MANIFEST NECESSITY FOR THE DECLARATION OF A MISTRIAL.

The United States Supreme Court has stated:

"The Double Jeopardy Provision of the Fifth

Amendment, however, does not mean that everytime a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final Judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the Double Jeopardy prohibition is aimed."

Wade v. Hunter, 336 U.S. 684, 688 (1949).

In the present case, jeopardy had technically attached with the swearing of the jury on November 29, 1976. United States v. Jorn, 400 U.S. 470, 480 (1971). While jeopardy had technically attached, neither defendant had endured the time, expense or anxiety of one minute of trial.

It cannot be argued that the Government benefited in any way from the declaration of a mistrial. The Government has yet to present one scintilla of evidence against the defendants, although it has remained ready to do so since May 6, 1976.

The principles which have guided Federal courts in the application of the concept of double jeopardy to situations giving rise to mistrials were stated by Mr. Justice Story as follows:

"We think that in all cases of this nature the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the

circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office."
(Emphasis supplied).

United States v. Perez, 9 Wheat. 579, 580 (1824).

In situations where mistrials have been declared sua sponte by the trial judge, the United States Supreme Court has consistently refused to establish any sort of strict regulatory standards for the application of the double jeopardy clause. Wade v. Hunter, supra, at 690. The Supreme Court has instead examined each case on its own merits. Whether or not a mistrial was necessary in the present case, then, calls for an investigation of the facts, bearing in mind the various interests of the parties and the public. Often a defendant's interest in having his trial concluded by the same tribunal before which it began must be subordinated to the public's interest in achieving fair trials. Wade v. Hunter, supra, at 689; Illinois v. Somerville, 410 U.S. 458, 463 (1973).

In the present case, the Government was obviously entitled to its petition for mandamus since its peremptory challenges

had been disallowed by the trial court. The Government was also entitled to have its original challenges reinstated by this Court. The defendants, on the other hand, had no right to proceed with a jury among which were individuals previously peremptorily challenged by the Government. Had the defendants elected to proceed in accordance with the first alternative mandated by the Newman decision, they would have been virtually in the same position as they had been on June 21, 1976. In fact, with the Government's peremptory challenges now allowed, the status quo would have been maintained. However, the defendants elected not to proceed with that jury, knowing that the only alternative available to the trial judge was the declaration of a mistrial.

The present case does not involve a situation where the trial judge failed to explore reasonable alternatives prior to the declaration of a mistrial. United States v. Grasso, F.2d

(2d Cir. Slip Op. 2255, March 9, 1977). Under the decision of this Court in United States v. Newman, supra, the only alternative available to the trial judge was the declaration of a mistrial, subsequent to the defendants' rejection of the opportunity to proceed to trial with the modified jury. The declaration of a mistrial was necessary to comply with the mandate of this Court.

C O N C L U S I O N

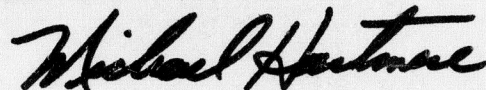
For all of the foregoing reasons, the Government respect-

fully urges that the well-reasoned opinion of the District Court denying the defendants' motion to dismiss on grounds of double jeopardy be affirmed.

Respectfully submitted,

UNITED STATES OF AMERICA

PETER C. DORSEY
UNITED STATES ATTORNEY



BY: MICHAEL HARTMERE
ASSISTANT UNITED STATES ATTORNEY

CERTIFICATE OF SERVICE

This is to certify that two copies of the within and foregoing Brief for Appellee were forwarded this 12th day of April, 1977, to: Andrew B. Bowman, Esquire, Chief Federal Public Defender, 770 Chapel Street, New Haven, Connecticut, 06510; John R. Williams, Esquire, 265 Church Street, New Haven, Connecticut, 06510; and the Honorable Thomas J. Meskill, United States Circuit Judge, United States Post Office, West Main Street, New Britain, Connecticut, 06050.



MICHAEL HARTMERE
ASSISTANT UNITED STATES ATTORNEY

